

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)	
)	
Amendment of the Commission's <i>Ex Parte</i> Rules)	GC Docket No. 10-43
and Other Procedural Rules)	
)	

COMMENTS OF MEDIA ACCESS PROJECT

Media Access Project (MAP)¹ respectfully submits the following comments in response to the Commission's FNPRM with respect to the adoption of enhanced disclosure requirements.² MAP applauds the Commission's efforts to update the *ex parte* rules, which promote transparency and encourage informed decision-making. As set forth below, the Commission should further modify the rules to require disclosure of real parties-of-interest in oral and written *ex parte* presentations and other forms of advocacy conducted on matters under consideration.³ This proposal is limited to circumstances where parties receive substantial payments in cash or in kind in exchange for advocacy on a particular matter. MAP may address disclosure proposals that other parties may make in forthcoming reply comments.

The *ex parte* rules attempt to facilitate the Commission's need for timely information while accommodating the public's need to "know what information and arguments are being presented to the Commission and *who* is presenting them."⁴ Due process requires disclosure of third parties

¹ Media Access Project is a non-profit, public interest law firm and advocacy organization working in communications policy. For more information, visit www.mediaaccess.org.

² *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules, Report and Order and Further Notice of Proposed Rulemaking*, 26 FCCRcd. 4517, 4538-4540 (2011), ¶¶77-84.

³ *Id.* at 4540, ¶82 ("[I]f a party is submitting a comment under its own name that was given to it by another entity with the request that the party file it in the party's own name, should the filer be required to identify the source of the comment? What if an entity other than the filer paid for the preparation of the filing?").

⁴ *Id.* at 4520, ¶15 (emphasis added).

who act as ghost advocates under the umbrella of another organization.⁵ In *Home Box Office v. FCC*, 576 F.2d 9 (D.C. Cir. 1977) (“HBO”) the D.C. Circuit emphasized that having “one administrative record for the public and...another for the Commission and ‘those in the know’” is fundamentally unfair.⁶ To permit parties to accept substantial contributions from an undisclosed third party for the primary purpose of advocating on a particular matter before the Commission is to permit such organizations to act in defiance of the goal of *ex parte* rules—to have a complete record of the matter on the docket. It keeps “those in the know” one step ahead of other interested parties. Such behavior deceives the public and the Commission, resulting in less transparency and perpetuating uninformed decision-making. Informed decision-making requires disclosure of those secretly funding the advocacy.

DISCUSSION

MAP urges the Commission to adopt a rule requiring parties which receive substantial contributions for the primary purpose of advocating on a particular matter under consideration at the FCC to disclose the identity of the contributor. Furthermore, a party should be required to disclose if it accepts a substantial contribution in exchange for agreeing to submit a filing in which the funding entity contributed to the substantive content. It is difficult to assess the frequency with which parties accept contributions, monetary or otherwise, in exchange for advocacy on Commission-related matters. Requiring parties to disclose their acceptance of third-party incentives for the purpose of targeted advocacy would be hard to enforce. Nonetheless, the Commission should require disclosure in such instances because it would foster transparency, provide a more accurate record, and produce a minimal burden on affected parties.

⁵ *Id.* (quoting *Home Box Office v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977) (“undocumented discussions are ‘inconsistent...with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law.’”)).

⁶ *Id.*

MAP disagrees with the argument that requiring disclosure would be too burdensome or redundant. The FCBA's argument that requiring greater disclosure of the identities of commenters is unnecessary because parties typically identify themselves in their pleadings misses the point of this proposed disclosure requirement.⁷ It is not to require every pleading to have a tag line explaining who filed the document,⁸ but rather, the goal is to uncover instances where organizations receive substantial payments for the purpose of advocating on a specific matter at the Commission. Additionally, AT&T's suggestion that the FCC seek more information from parties with unknown interests is overly burdensome because the FCC is not in the best position to know from which parties it should seek additional information. In the alternative, requiring parties which receive substantial payments to disclose details about the donor is not overly burdensome because those who receive funding are in the best position to disclose such information, and because the requirement would be limited to instances where parties received contributions for the express purpose of advocating on a particular matter.

While there is no clear answer, disclosure should be required where an otherwise unnamed party has made a substantial contribution for the express purpose of advocacy on a particular matter under consideration. What is "substantial" varies depending on the size of the organization. To establish a fixed dollar amount is detrimental to the purpose of exposing the real parties-of-interest,⁹ because factors such as the size of the advocacy organization and economic inflation may affect the

⁷ See In the Matter of Amendment of the Commission's *Ex Parte* Rules and Other Procedural Rules, Comments of the Access to Records Committee of the Federal Communications Bar Association, GC Docket No. 10-43 (Jul. 2010).

⁸ See *id.* (MAP agrees with FCBA that most parties already include such identifying information in filings since it "provide[s] a context for their arguments").

⁹ *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules, Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd. at 4520 ("The Commission's *ex parte* rules attempt to assure that the Commission's use of *ex parte* presentations as a means of obtaining timely information is consistent with the need to assure that interested parties, and the public, know what information and arguments are being presented to the Commission and *who* is presenting them" (emphasis added)).

weight a particular contribution carries. A fixed dollar amount additionally would shield those who receive non-dollar contributions from having to disclose the ultimate driver behind their advocacy.¹⁰

MAP understands that trade associations face a unique situation in that they receive financial contributions in the form of member dues, and that dues are paid for the purpose of advocacy on matters before the Commission.¹¹ However, MAP is not concerned with the ordinary activity of trade associations. To require trade associations to disclose every contribution would be overly burdensome, would detract from the matter of concern on which they are advocating, and would not further the FCC's goal of transparency because such disclosure would create a thicket of documentation that others would have to wade through before arriving at the heart of the issue. However, that is not to say trade associations should be shielded from having to disclose donor information in all circumstances. In the foreseeable instance where one or more members of the association make contributions other than ordinary dues for the primary purpose of advocacy on a particular matter, then the trade association must disclose such information.

In an attempt to develop a framework for disclosure requirements that is flexible enough to apply to organizations of all sizes and that anticipates advocacy in various forms, Media Access Project urges the Commission to consider a rule similar to the requirements under Rule 29(c)(5) of the Federal Rules of Appellate Procedure, which governs amicus briefs.¹² Rule 29(c)(5) requires disclosure of authorship and financing of amicus briefs where:

(A) a party's counsel authored the brief in whole or in part; (B) a party or a party's counsel contributed money that was intended to fund

¹⁰ It is important to consider contributions that are not in monetary form.

¹¹ MAP agrees with NCTA and NAB that requiring trade associations to disclose a list of all members in every filing would be inefficient and would likely dissuade organizations from participating in proceedings. *See* National Telecommunications Cooperative Association Initial Comments, GC Docket No. 10-43 at 9-10 (May 10, 2010); *see* Reply Comments of National Association of Broadcasters, GC Docket No. 10-43 at 5 (June 8, 2010) ("achieving meaningful disclosure is not a 'one size fits all' issue").

¹² Fed. R. App. Pro 29(c)(5).

preparing or submitting the brief; and (C) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identities of each person.

The applicable portion of Rule 29 could be modified to meet the needs of the Commission and the public to know the third party interests of proceeding participants. The rule is not overly burdensome because the parties who would be required to disclose are in the best position to inform and few parties would likely be affected by such a requirement.

CONCLUSION

For the reasons stated above, Media Access Project urges the Commission to adopt a rule requiring disclosure of unnamed parties who contribute to a party advocating in a matter before the Commission. Adoption of a version of Federal Rule of Appellate Procedure Rule 29(c)(5) would further the Commission's transparency goals by sufficiently informing the public, the Commission, and interested parties of real-parties-of-interest.

Respectfully submitted,



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